

Notice of Decision and Reasons for Decision

Applicant: AB4
Agency: Department of Justice and Community Safety
(formerly Department of Justice and Regulation)
Decision Date: 26 March 2019
Exemptions considered: Sections 33(1) and 38

FREEDOM OF INFORMATION – prison medical file – Corrections Act 1986 – section 104ZZA – relevant person – personal or confidential information - secrecy provision.

All references to legislation in this document are to the *Freedom of Information Act 1982 (Vic)* (**FOI Act**) unless otherwise stated.

Notice of Decision

I have conducted a review under section 49F of the Agency's decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request is the same as the Agency's decision in that I have decided to refuse access to the documents in part.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

Joanne Kummrow
Acting Public Access Deputy Commissioner

26 March 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:

Final section of the medical file.
2. In its decision, the Agency identified five documents comprising 11 pages, falling within the terms of the Applicant's request. It decided to grant access to the documents in part.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have examined copies of the documents subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Applicant's submission dated 15 March 2019 and information provided with the Applicant's review application; and
 - (c) the Agency's submission dated 28 February 2019.
7. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

Review of exemptions

8. The Agency relied on sections 33(1) and 38 to refuse access to the documents in part. The Agency's decision letter sets out the reasons for its decision.

Section 38

9. Section 38 provides:

38 Documents to which secrecy provisions of enactments apply

A document is an exempt document if there is in force an enactment applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications.

10. In order for section 38 to apply to an enactment, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.
11. The Agency relies on section 38 in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic) (**Corrections Act**) to exempt a small portion of information in the documents.

12. Section 104ZZA of the Corrections Act provides:

A person who is or has been a relevant person must not use or disclose personal or confidential information unless that use or disclosure is authorised under section 104ZY and 104ZZ.

13. 'Personal or confidential information' is defined to include:¹

...

(c) Information –

- (i) that identifies any person or discloses his or her address or location or a journey made by the person; or
- (ii) from which any person's identity, address or location can reasonably be determined; (emphasis added).

14. This type of information cannot be disclosed by a 'relevant person' unless authorised. A 'relevant person' is an employee of the Agency.²

15. The Agency applied the secrecy exemption in section 38 to the names and position titles of medical staff who were involved in the medical treatment of the Applicant whilst he was serving a prison term.

16. I am satisfied the exempted information is information from which the identity of third parties can be reasonably determined and is therefore 'personal or confidential' information as referred to under section 104ZZA of the Corrections Act.

17. Sections 104ZY and 104ZZ of the Corrections Act set out a number of exceptions to the prohibition of relevant persons disclosing personal or confidential information. Having reviewed these exceptions, I consider there is no information before me to suggest that any of the exceptions authorising disclosure of the documents apply in this instance.

18. In summary, I am satisfied section 104ZZA of the Corrections Act prohibits employees of the Agency from disclosing the personal information contained in the documents. As a consequence, I am satisfied section 38 of the FOI Act applies to the names and position titles of medical staff and exempt this information from release.

19. Having determined the information is exempt under section 38, it is not necessary for me to consider the Agency's application of section 33(1) to the same information.

Deletion of exempt information

20. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt information and the applicant agrees to receiving such a copy.

21. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'³ and the effectiveness of the deletions. Where

¹ Section 104ZX of the Corrections Act.

² Ibid.

³ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 [82].

deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.⁴

22. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable for the Agency to delete the exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

23. On the information available and in light of the secrecy provisions in the Corrections Act, my decision on the Applicant's request is the same as the Agency's decision in that I have determined the information sought is exempt under section 38.
24. As it is practicable for the Agency to edit the documents to delete irrelevant and exempt information, I have determined to grant access to the documents in part.

Review rights

25. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (VCAT) for it to be reviewed.⁵
26. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶
27. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁷
28. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
29. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.⁸

When this decision takes effect

30. My decision does not take effect until the relevant review period (stated above) expires, or if either party applies to VCAT for a review, until the VCAT proceeding is concluded.

⁴ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 [140], [155].

⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁶ Section 52(5).

⁷ Section 52(9).

⁸ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	Patient Medication Order	2	Released in part Sections 33(1) and 38	Release in part Section 38	<p>Section 38: Section 104ZZA of the Corrections Act applies to 'personal or confidential information' and the definition of that term applies to the personal and identifying information captured in the documents subject to review.</p> <p>I am also satisfied section 104ZZA prohibits Agency officers from disclosing the personal information in the documents. Therefore, I am satisfied the personal and identifying information in the document is exempt under section 38.</p>
2.	[Date]	Problem List	1	Released in part Sections 33(1) and 38	Release in part Section 38	For the reasons provided in Document 1 above.
3.	[Date]	Referral List	1	Released in full	Not subject to review	
4.	[Date]	Plan	2	Released in part Sections 33(1) and 38	Release in part Section 38	For the reasons provided in Document 1 above.
5.	[Date]	Patient Appointment List	5	Released in part Sections 33(1) and 38	Release in part Section 38	For the reasons provided in Document 1 above.